

deceive.^{17/} It is undisputed that (a) DBI incorrectly represented in the April 18 Response and in the October 15 Response that there were approximately 20 hires during the License Period and (b) the correct number of hires was 104. It is also uncontroverted that this inaccuracy was not intentional, but was the product of oversight, carelessness and an honest misunderstanding; and the inaccuracy was voluntarily disclosed.

117. The representation that there were approximately 20 hires during the License Period was first made in the Supplemental Report filed April 18, 1991. This representation was added to the Supplemental Report by Ms. Marshall, DBI's attorney, with the intention of summarizing the facts set forth in a previous DBI filing. Ms. Marshall believed in good faith that the representation was accurate. At no time did Ms. Marshall discuss the representation with Mr. Bramlett or call it to his attention. She did not think there was a need to do so since, to her understanding, it merely repeated facts earlier verified. (Paragraphs 57-59, supra.)

118. While Mr. Bramlett did attest to the accuracy of the facts set forth in the Supplemental Report, he "totally missed" the misstatement concerning the number of hires in the License Period because he merely flipped through that portion of the Supplemental Report (containing what he believed was legal

^{17/} The mistakes in fact cut both ways. In addition to the misstatements as to the number of hires, DBI understated in its annual employment reports and the Opposition the number of minorities who worked at the Stations.

argument). Admittedly, a careful reading of the Supplemental Report would have revealed the inaccuracy. However, it was Mr. Bramlett's approach to focus his attention on the accuracy of the new facts provided in pages 4 through 6 of the Supplemental Report, as he understood he was supposed to, and did not focus on the information on pages 2 and 3 of the Report which purported to summarize facts previously supplied in the Opposition.

(Paragraph 59, supra.) Mr. Bramlett did not realize the misstatement had been made.

119. The representation that there were approximately 20 new hires during the License Period occurred for the second time in the October 10 Statement. The record reflects that Mr. Bramlett was called by Ms. Marshall on or about October 10, 1991, and understood he was being asked to explain why there was a variation in hiring rates between the 12 in the Reporting Year and eight in the multiple-month period thereafter.^{18/} Mr. Bramlett responded with his explanation ascribing the variation to differences in turnover rate. At no time during this short conversation did Ms. Marshall mention the number 20 or discuss the total number of hires during the License Period. (Paragraphs 62-63, supra.)

120. Mr. Bramlett concedes that a careful reading of the October 10 Statement would reveal that DBI had represented there

^{18/} The March 15 Letter had requested information for the Reporting Year only. DBI had volunteered information with respect to the period subsequent thereto.

had been approximately 20 hires during the License Period. Mr. Bramlett admittedly did not review the Statement carefully enough, however, and missed that point. Nor did he review the Statement with that focus in mind. His brief conversation with Ms. Marshall had consisted of one question and one answer concerning turnover rate and had nothing to do with the total number of hires during the License Period. He believed that the October 10 Statement was responsive to Ms. Cooper's question as he understood it from Ms. Marshall. Mr. Bramlett was unaware that any representation had been made in the Supplemental Report as to the total number of hires during the License Period. Mr. Bramlett further testified that he would never try to convince the FCC or anyone familiar with the broadcasting industry that his Alabama radio stations had hired 12 non-minorities in the one-year Reporting Year and seven minorities only in the balance of the seven-year License Period. (Paragraphs 64-66, supra.)

121. In sum, the misstatement in the October 10 Statement was the product of Ms. Marshall's continued good faith misunderstanding, never discussed with Mr. Bramlett, as to the number of hires during the License Period, and Mr. Bramlett's failure to catch this mistake. The misstatement was not intentional. They were like "two ships passing in the night."

122. The unintentional nature of the misstatement is underscored by DBI's conduct in connection with the January 13 Response. In this filing DBI voluntarily disclosed the existence of five times the number of hires during the License Period than

had previously been reported -- after Mr. Van Horn had advised him of the harm to which the additional disclosure would lead. This action belies an intent to deceive. It makes no sense to suggest that DBI intended to deceive the Commission in the Supplemental Report and the October 10 Statement but suddenly gave up its ruse or changed its mind. While it is true that the FCC had demonstrated there must have been at least 32 hires during the License Period, there were other ways to respond to this assertion if DBI's intent all along had been to deceive: DBI could have stated that it only had records with respect to 20 hires although there may have been more; or DBI could have come up with 12 or so more hires and satisfied the FCC's concern. The surest way to expose deception was to do as DBI did and disclose that there were 120 additional hires during the License Period.^{12/} This conduct is not consistent with an intent to deceive.

123. Finally, the ultimate factor demonstrating the absence of deceptive intent is the utter lack of motive on DBI's part to inflate the number of hires. The statistical guideline utilized by the Commission in evaluating the effectiveness of an EEO program is a comparison of the percentage of minority hires during the relevant period to the percentage of minorities in the

^{12/} DBI's candor is further demonstrated by the fact that it disclosed the hiring of 57 individuals whom it did not consider as employees. DBI could have opted to disclose the 83 hires only on the theory that the remaining 57 were outside the scope of the inquiry.

applicable labor force. Amendment to Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967, 3974 (1987) (subsequent history omitted). Under the so-called "50% of parity test," a licensee complies with the benchmark if the percentage of minorities hired during the relevant period equals or exceeds 50% of the percentage of minorities in the applicable labor force. Under the worst case scenario -- assuming all 140 hires were employees for FCC purposes -- the percentage of minority hires during the License Period (9 of 140, or 6.43%) substantially exceeds the 50% of parity benchmark (50% of 7.4%, or 3.7%). Moreover, assuming 104 hires as the Commission concluded in the HDO, the percentage of minority hires during the License Period (8 of 104, or 7.69%) exceeds 100% of parity. (Paragraphs 18-20, supra.)^{20/}

^{20/} It is beyond cavil that Ms. Marshall had no reason or motive to dissemble. There is no reason to doubt that she believed the number of new hires in the License Period was approximately 20 when she drafted and filed the April 18 Response and the October 15 Response. Given this fact, in order for Mr. Bramlett to have knowingly misrepresented the number of hires, he would have had to focus on the representation in the April 18 Response (even though he had not discussed it with Ms. Marshall) and its falsity, and nonetheless fail to discuss the mistake with Ms. Marshall; that is, intentionally take advantage of Ms. Marshall's inadvertent mistake -- hardly a likely scenario and totally out of character. It is likewise inconceivable that an innocent mistake in the April 18 Response was noticed for the first time and knowingly adopted by Mr. Bramlett in the October 15 Response.

(2) Misstatement as to Explanation for Hiring Inaccuracy.

124. The second misstatement by DBI occurred in its explanation in the January 13 Response, which was repeated in the February 7 Response, with respect to the discrepancy between the number of hires previously reported (20) and the actual number of hires. This misstatement resulted from (1) Ms. Marshall's good faith belief as to the facts, (2) her failure to affirmatively confirm her belief with Mr. Bramlett and (3) Mr. Bramlett's concentration on other portions of the filings containing the facts he had provided and failure to read each filing in its ~~entirety including the footnotes in which the explanation was set~~

or appropriate to second-guess their interpretation or advice with respect to such inquiries. Throughout the investigative process he felt secure in the fact that his interests were being protected by counsel. He responded promptly at all times to his counsel's inquiries and instructions, fully and to the best of his ability. In responding to these queries, however, he did not refer back to previous DBI filings to make sure the responses fit together and were consistent. He expected counsel to do that. In hindsight, he realizes he should have reviewed the entire statements prepared for his signature as carefully as he reviewed the facts he had provided.

126. Each misstatement made by DBI in the course of the FCC inquiry reflected the same modus operandi between attorney and client. Each FCC letter received by DBI, save one, was preceded by a telephonic inquiry to Ms. Marshall from Hope Cooper. Before Mr. Bramlett received a copy of the FCC letter, Ms. Marshall advised Mr. Bramlett by telephone as to the nature of the FCC request and asked Mr. Bramlett questions designed to elicit information to respond thereto. Mr. Bramlett responded promptly, in good faith and to the best of his ability. Mr. Bramlett received copies of the FCC letters after having received Ms. Marshall's marching orders. He glanced at the letters but did not read them carefully because he had discussed them with counsel whom he believed had already read them carefully.

127. Each written response filed by DBI was drafted by Arent Fox. The factual content of the responses consisted of informa-

tion provided by Mr. Bramlett and information derived by Ms.
Marshall from DBI's files. On several occasions DBI's responses
included ~~factual representations attested to by Mr. Bramlett~~

case at least through two stages of appeal, even if it prevailed at the initial decision level. Based upon the time and resources that would be devoted to the appeals, and given DBI's primary goal -- to retain the Stations to which Mack Bramlett has devoted his life -- DBI has agreed with the Mass Media Bureau that the Misrepresentation Issue should be resolved against DBI but that, as contemplated in paragraph 20 of the HDO, the resulting sanction should not be disqualifying.

130. This is an appropriate case for a sanction short of disqualification. The Misrepresentation Issue is couched in terms of a violation of Section 73.1015 of the Commission's Rules. Section 73.1015 reads in pertinent part that a licensee shall not "make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission." While misrepresentations and willful omissions have always been proscribed by the Commission, the prohibition was embodied for the first time in a Commission rule in 1986 in order to allow the Commission flexibility to levy sanctions short of disqualification. Policy Statement on Character Qualifications in Broadcast Licensing, 102 F.C.C. 2d 1179, 1233 (1986) (subsequent history omitted) ("Policy Statement").

131. The Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission

will consider the willfulness of the misconduct, its frequency and the licensee's record of compliance with the Commission's rules and policies. Policy Statement, supra, at 1225-1229.

132. Based on a review of these factors, it is clear that DBI can be relied upon in the future to be truthful with the Commission and to comply with its rules and policies. First, DBI's violation of Section 73.1015 was not willful or intentional, it was the product of carelessness, misunderstanding and miscommunication. It was also an isolated occurrence. The inaccurate filings resulted from an attorney-client modus operandi confined to a single FCC investigation. Most significantly, DBI's record of compliance with the FCC's rules and policies over the last 20 years is otherwise spotless. In short, DBI has been a model licensee except for its aberrant behavior in connection with the EEO inquiry which is the subject of this proceeding. DBI has already paid a substantial penalty for its actions in the form of the time and expense necessary to defend itself in the renewal hearing. Under these circumstances, no purpose would be served by taking away DBI's license. See Abacus Broadcasting Corp., 7 FCC Rcd 6004 (A.L.J. 1992).

B. The EEO Program Issue.

133. Section 73.2080(b) of the Commission's Rules requires licensees to "establish, maintain, and carry out a positive and continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and

practice." In specifying the EEO Program Issue, the Commission noted the following:

Review of all submissions reflect that the licensee had 104 hiring opportunities during the license term. The licensee reported contacting seven general sources during the license term and receiving some minority applicants. However, the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term is unclear because the licensee reported recruitment and applicant data only for positions for which it considered and/or hired Blacks. The licensee has presented little evidence that it consistently contacted recruitment sources likely to refer minorities when vacancies occurred or that it evaluated its employment profile and job turnover against the availability of minorities in its recruitment area pursuant to Sections 73.2080(b)(2) and (3) of the Commission's Rules, 47 C.F.R. Sections 73.2080. It is unclear how it could meaningfully self-assess its EEO program, including the productivity of its recruitment sources as it claimed, with such limited and incomplete information. In addition, we question the licensee's self-assessment of its EEO efforts when, in one response, it argues the success of a program that resulted in the hiring of seven minorities out of 20 hires

"the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term." Such data was presented "only for positions for which it considered and/or hired Blacks" because, to the extent the Stations kept records, such records pertained to minority hiring efforts. (Paragraph 22, supra.)

135. The record further reflects that DBI did not "consistently contact recruitment sources likely to refer minorities when vacancies occurred", although DBI's efforts in this area improved as the License Period progressed. Nor did DBI evaluate its employment profile and job turnover against the availability of minorities in its recruitment area. Mr. Bramlett had no such formal evaluation process and performed no statistical analysis of the Stations' EEO performance. (Paragraph 29, supra.)

136. This is not to say that DBI did not take its EEO obligations, as it perceived them, seriously. Throughout the License Period Mr. Bramlett attempted to obtain minority applicants and to hire qualified minorities and was keenly focused on being nondiscriminatory in hiring. In addition, Mr. Bramlett evaluated the effectiveness of his EEO performance on an ongoing basis, albeit informally, throughout the License Period. He judged such effectiveness by the extent to which minority applicants were produced. Mr. Bramlett believed, and continues to believe, that the Stations' EEO program during the License Period was effective. As noted above, the Stations hired nine minorities during this period and substantially exceeded the 50% of parity

test under any factual scenario. Moreover, commencing in 1989, DBI adopted a formal EEO program modeled after the NAB Handbook. (Paragraphs 25-30, 32-33, supra.)

137. In assessing the sanctions warranted with respect to a deficient EEO program, the Commission examines not only the licensee's ability to demonstrate compliance with Section 73.2080(b), but also the results of the EEO program. Possible sanctions range from reporting conditions to forfeitures to short-term renewals. DBI is aware of no decision which has denied license renewal based on noncompliance with Section 73.2080(b), absent intentional misrepresentation or discrimination. (See HDO at paragraph 6.)

138. DBI's EEO record, as noted, reflects a failure to dot its "i's" and cross its "t's" with respect to the provisions of Section 73.2080(b) in that DBI engaged in sporadic recruitment efforts, did not adequately and formally self-assess its recruitment program and did not maintain adequate records for self-assessment for each job vacancy. On the other hand, DBI did hire nine Blacks, interviewed several minority applicants who were not hired, offered positions on at least two occasions to minorities who declined, and substantially exceeded the 50% of parity guideline over the License Period. DBI is sensitive, however, to the fact that the record reflects inconsistencies and inaccuracies in reporting which, though not intentional, were admittedly the product of DBI's own carelessness. Under these

circumstances, DBI acknowledges that some sanction would be appropriate.

139. For the reasons set forth above, DBI urges the Presiding Judge to resolve the Misrepresentation Issue and the EEO Program Issue in the manner agreed to by DBI and the Mass Media Bureau by granting the Renewal Applications on a short-term basis and subject to reporting conditions and by imposing a

CERTIFICATE OF SERVICE

I certify that the foregoing Proposed Findings of Fact and Conclusions of Law of Dixie Broadcasting Inc. was served on the 30th day of April, 1993 by hand-delivering a copy thereof to the following:

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Honorable Arthur L. Steinberg